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FILED
JUL 12 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 338

In the Matter of

LEON FISCHBEIN,

Petitioner,

—v.—

THE BROOKLYN BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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Petitioner prays that a Writ of Certiorari issue to review, either or both, as may be jurisdictionally necessary or proper, the two orders of the Court of Appeals of the State of New York and the two orders of the New York Supreme Court, Appellate Division, Second Department.

Opinions Below

The order of the Supreme Court, Appellate Division, Second Department, which denied petitioner's application for reinstatement to the bar as an attorney and counsellor at law, rendered no opinion (Appendix A).

The order of the New York Supreme Court, Appellate Division, Second Department, which granted the motion to reargue, and upon reargument, adhered to its original decision denying the motion for reinstatement; and by this

order denied petitioner's motion for permission to examine the report of the Committee on Character and Fitness which was filed with the Court, rendered no opinion (Appendix B).

The petitioner, after filing a notice of appeal to the Court of Appeals of the State of New York, moved for an order directing the New York Supreme Court, Appellate Division, Second Department, to furnish petitioner with a copy of the report of the Committee on Character and Fitness or in the alternative for an order requisitioning the report as filed with the Appellate Division, in order to perfect the appeal and for review by the Court of Appeals. The Court of Appeals considered this motion as a motion for leave to appeal and denied the motion on the ground that only questions of non-reviewable discretion were involved (Appendix C).

A motion to re-argue the preceding motion was made and the Court of Appeals denied the motion for reargument and rendered no opinion (Appendix D).

Jurisdiction

Review in this court is addressed to the two orders of the New York Supreme Court, Appellate Division, Second Department, dated July 12, 1965 and September 20, 1965 and the two orders of the New York Court of Appeals dated December 1st, 1965 and February 17th, 1966.

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3) since the petitioner is claiming denial of due process of law under the 5th amendment to the United States Constitution; that he was subjected to cruel and unusual punishment in violation

of his rights under the 8th Amendment to the United States Constitution; and that he was denied due process of law and equal protection of the law as provided for by the 14th Amendment of the Constitution of the United States.

The jurisdiction of the Court is further invoked on the grounds that he was denied his rights, privileges and immunities under the New York State Constitution, Article I, Sections 1, 5, 6 and 11.

Statement

The petitioner was admitted to practice in the Courts of New York on March 19, 1931 and was disbarred from the practice of law on January 3, 1950 for professional misconduct arising out of an isolated incident which did not constitute a crime.

On May 18, 1964 he made a motion for reinstatement. The Brooklyn Bar Association, although served with a copy of these motion papers, did not serve, file or in any manner enter any objection or opposition to the application.

The New York Supreme Court, Appellate Division, Second Department, made an order referring the application to the Committee on Character and Fitness for the Second Department for

> "(a) Investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law and
>
> (B) For a report setting forth the committee's findings and recommendations" (Appendix E).

Thereafter, in full compliance with the directions of the Committee on Character and Fitness, the petitioner filed

with the said committee a written application together with a written sworn statement and other requested and pertinent affidavits.

On January 19, 1965, under oath, before a sub-committee of the Committee on Character and Fitness, the petitioner testified to facts pertinent to his character and fitness. That subsequently the Committee on Character and Fitness filed its report, and, upon information and belief, found that petitioner possessed the requisite character and fitness for an attorney at law, and recommended that the petitioner be reinstated to the bar. Petitioner has no alternative but to make the foregoing statement upon information and belief because his requests to examine the report, findings, and recommendations of the Committee on Character and Fitness were denied by the Supreme Court, Appellate Division, Second Department, and the Court of Appeals of the State of New York. That at no time in any of the proceedings heretofore had, did the Broklyn Bar Association, or any individual appear or serve any papers in opposition to the application made by the petitioner. However, although petitioner has made this statement in all previous motion papers relative to the examination of the report, at no time did the Courts state that the report was not favorable to the petitioner or that the report did not recommend petitioner's reinstatement to the bar.

On July 12, 1965 the order of the Appellate Division, Second Department, recited, inter alia,

> "that the committee having filed its report and due deliberation having been had thereon, it is ordered that the application be denied" (Appendix A).

The report of the Committee on Character and Fitness is the crux of this petition. It is the contention of the petitioner that in the event the report of this committee recommended petitioner's reinstatement to the bar, then the decision of the Supreme Court, Appellate Division, Second Department, denying the motion for reinstatement was arbitrary, capricious, and denied petitioner due process of law and equal protection of the law (*Willner v. Committee on Character and Fitness, et al.*, 373 U.S. 96).

This petition for Writ of Certiorari is based entirely on the report, findings and recommendations of the Committee on Character and Fitness. It is on this report that the Supreme Court, Appellate Division, Second Department, had deliberated. The said Court stated in its order. . . .

> "and the Committee having filed its report, and due deliberation having been had thereon:
>
> It is ordered that the application for re-instatement as an attorney and counsellor at law be and the same hereby is denied" (Appendix A).

The petitioner moved in the Supreme Court, Appellate Division, Second Department, to reargue the motion for reinstatement and to examine the report and recommendations of the Committee on Character and Fitness. The motion to reargue was granted and when reargued the Court adhered to its original decision and denied the motion to examine the report of the Committee on Character and Fitness (Appendix B).

A Notice of Appeal to the Court of Appeals was then filed. In order to perfect the case on appeal, a motion was made to the Court of Appeals for an order directing the

Supreme Court, Appellate Division, Second Department, to furnish the petitioner with a copy of the report or in the alternative to forward the report of the Committee on Character and Fitness to the Court of Appeals. This motion in effect was never decided by the Court of Appeals, instead the Court considered this motion as a motion for leave to appeal and denied petitioner's motion and his right to appeal to the Court of Appeals (Appendix C).

A motion to reargue was made in the New York Court of Appeals, and the motion was denied with no opinion (Appendix D).

It is the contention of the petitioner that he had an absolute right to appeal from the orders of the Supreme Court, Appellate Division, Second Department, pursuant to the Civil Practice Laws and Rules, Section 5601 (b) 1., in that the said orders were final orders of a matter which originated in the Supreme Court, Appellate Division, Second Department, and there is directly involved the construction of Article I, Sections 1, 5, 6 and 11 of the Constitution of the State of New York and the 5th, 8th and 14th Amendments of the United States Constitution. The petitioner had a right to appeal to the Court of Appeals and did not need permission from either Court in order to prosecute his appeal under the provisions of Civil Practice Laws and Rules, 5601 (b) 1. Therefore, the orders of Court of Appeals deprived petitioner of due process of law.

Questions Presented

1. Was the denial of the petitioner's application for reinstatement to the bar by the New York Supreme Court, Appellate Division, Second Department, arbitrary and capricious as to constitute a denial of due process and equal protection of the law?

2. Was the petitioner denied due process of law and equal protection of the laws when his motion for reinstatement as an attorney and counsellor at law was denied although the Committee on Character and Fitness reported to the Supreme Court, Appellate Division, Second Department that the petitioner presently possessed the requisite character and fitness for an attorney at law?

3. Was the petitioner denied due process of law when, after having filed a Notice of Appeal from the orders of the Supreme Court, Appellate Division, Second Department, the Court of Appeals treated a motion for permission to examine the report of the Committee on Character and Fitness as a motion for leave to appeal and thereby denied petitioner his right to appeal from a final order?

4. Was petitioner denied equal protection of the laws when, after 16 years of disbarment, the Committee on Character and Fitness appointed by the Court, having recommended his reinstatement and although there was no opposition the Court, without any further evidence or hearing, denied the application for reinstatement?

5. Was petitioner denied due process of law when he was denied the right to examine the report and recommendations of the Committee on Character and Fitness

as filed with the Appellate Division, Second Department, in order to perfect an appeal?

6. Was the petitioner denied due process of law by the Court of Appeals in treating the motion to examine the report of the Committee on Character and Fitness as an application for leave to appeal and denying the same?

7. Was the petitioner subjected to cruel and unusual punishment in violation of the 8th Amendment of the United States Constitution when although he established that he presently possessed the requisite character and fitness for admission to the bar as an attorney and counsellor at law, the Court disregarding the report and recommendations of the Committee on Character and Fitness, denied his application?

Constitutional and Statutory Provisions Involved

The case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 1, 5, 6 and 11 of the New York State Constitution; the Civil Practice Laws and Rules of the State of New York, Section 5601; the Judiciary Code of the State of New York, Section 90, subdivisions 1 and 10, the pertinent portions of which are quoted in the appendix F.

Reasons for Granting Writ

The petitioner has complied with the statutory requirements for admission as an attorney and counsellor at law as provided in the Judiciary Law, Section 90, Subdivision 1a and the order denying his application deprived him of due process of law and the equal protection of the law.

The Supreme Court, Appellate Division, Second Department, acted capriciously and arbitrarily in refusing to follow the recommendation of its own Committee on Character and Fitness. This was an abuse of their discretion and constituted denial of due process of law.

The Supreme Court, Appellate Division, Second Department, must follow the recommendations of its own Committee on Character and Fitness that petitioner be reinstated to practice law, unless it directs a hearing at which evidence may be presented pertaining to petitioner's character and general fitness requisite to practice law. In that event, petitioner has a right to be confronted with any witness against him. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96.

No such hearing was directed by the Appellate Division on this application. Consequently, the failure of the Appellate Division to follow the recommendation of its own Committee on Character and Fitness to re-instate the petitioner, constituted a denial of due process of law and equal protection of the laws. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96.

The Court's failure to follow the report and recommendation of its own Committee on Character and Fitness which found that petitioner presently possessed the requisite character and general fitness to practice law constituted cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution and Article 1, Section 5 of the New York State Constitution, the petitioner having been disbarred on January 3, 1950.

In re Sacher v. *Association of the Bar,* 347 U.S. 388;

In re Isserman, 348 U.S. 1 which reversed 345 U.S. 286.

The failure of the Supreme Court, Appellate Division, Second Department, to follow the report and recommendations of its own Committee on Character and Fitness deprived the petitioner of the equal protection of the laws and rights and privileges accorded to him by the 14th Amendment of the United States Constitution and by Article 1, Section 1 of the New York Constitution. Petitioner's unprofessional conduct did not constitute a crime and after a lapse of 16 years the Supreme Court, Appellate Division, Second Department, denied the application for reinstatement. However, in all the following cases this same Supreme Court, Appellate Division, Second Department reinstated disbarred attorneys to practice law although all of them had committed acts which constituted crimes and had suffered a disbarment of less than 16 years:

In re Levine, 284 App. Div. 864, 2nd Dept., reinstated December, 1954. Disbarred October, 1940, 260 App. Div. 1048. Disbarred for participating in in forgery upon a general release and a check.

In re Ray, 275 App. Div. 961, 2nd Dept., reinstated June, 1949. Disbarred May, 1941, 262 App. Div. 30. Disbarred upon his conviction for using the mails to defraud and fraudulent advertising in connection with mortgage certificates.

In re Stern, 275 App. Div. 769, 2nd Dept., reinstated April, 1949. Disbarred February, 1940, 258 App. Div. 1070. Disbarred for using "washed" documentary stamps.

In re O'Connor, 265 App. Div., 1062, 2nd Dept., reinstated 1943. Disbarred 1929, 226 App. Div. 600.

Disbarred for conversion of a substantial part of $5000 from one client and obtaining $150 from another client under false pretences.

In re Mazzaralla, 265 App. Div. 862, 2nd Dept., reinstated 1942. Disbarred 1939, 257 App. Div. 857. Forged the infant's name to the check; and then had the infant make a false affidavit. Forged the name of another client to a check and converted the proceeds to his own use, and other derelictions.

Other courts in other jurisdictions have consistently granted an application for reinstatement of a disbarred lawyer, if after the lapse of reasonable time, he, by his conduct has shown that he is contrite, has reformed and that he possesses the requisite character and fitness for the practice of law.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Order of Appellate Division, Second Department, Denying Petitioner Reinstatement

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 12th day of July, 1965.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice.*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of

LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

ORDER DENYING REINSTATEMENT

A proceeding having been instituted upon the petition of Leon Fischbein, verified the 7th day of May, 1964, for an order reinstating the said Leon Fischbein, as a member of the Bar (admitted March 11, 1931—disbarred by order of

Appendix A—Order of Appellate Division, Second Department, Denying Petitioner Reinstatement

January 3, 1950), and for such other and further relief as to the court may seem just and proper, and this court by order dated May 25, 1965 having referred the said application for reinstatement as a member of the Bar to the Committee on Character and Fitness for the Second Judicial District: (a) for investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law; and (b) for a report setting forth the Committee's findings and recommendations; and the Committee having filed its report, and due deliberation having been had thereon:

It is Ordered that the application for reinstatement as an attorney and counselor at law be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk.

APPENDIX B

Order of Appellate Division Granting Reargument and Adhering to Original Decision

At a Term of the Appellate Division of Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th day of September, 1965.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice.*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of

LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

A proceeding having been instituted upon the petition of Leon Fischbein, verified May 7, 1964, for an order reinstating him, as a member of the Bar (admitted March 11, 1931—disbarred by order of January 3, 1950), and this court by order dated May 25, 1965 having referred the said applica-

tion for reinstatement as a member of the Bar to the Committee on Character and Fitness for the Second Judicial District; and the Committee having filed its report, and this Court by decision and order dated July 12, 1965, having denied the application for reinstatement; and the petitioner having moved for reargument of his application for reinstatement and for permission to examine the report of the Committee on Character and Fitness filed with this court on his application, by notice of motion, dated August 26, 1965.

Now on reading and filing the affidavits of Leon Fischbein and James F. Ryan in support of said motion and the motion having been submitted by Mr. James F. Ryan of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the motion for reargument be and the same hereby is granted and,

Upon reargument, the original decision and order, be and the same hereby are adhered to; and it is further

Ordered that the motion to examine the report of the Committee on Character and Fitness be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

APPENDIX C

Order of Court of Appeals of the State of New York Denying Motion

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the First day of December A. D. 1965.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

2 Mo. No. 1045

In the Matter of the Application of LEON FISCHBEIN, for Reinstatement to the Bar,

Appellant,

BROOKLYN BAR ASSOCIATION,

Respondent.

A motion, considered as a motion for leave to appeal from the order of the Appellate Division dated July 12, 1965 denying reinstatement, having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C—Order of Court of Appeals of the State of New York Denying Motion

ORDERED, that the said motion be and the same hereby is denied upon the ground that only questions of non-reviewable discretion are involved.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

APPENDIX D

Order of Court of Appeals of the State of New York Denying Reargument

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of February A. D. 1966.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

1 Mo. No. 203

In the Matter of the Application of LEON FISCHBEIN, for Reinstatement to the Bar,

Appellant,

BROOKLYN BAR ASSOCIATION,

Respondent.

A motion for reargument of a motion which was considered by this Court as a motion for leave to appeal having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D—Order of Court of Appeals of the State of New York Denying Reargument

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEAEON KIMBALL
Deputy Clerk

[SEAL]

APPENDIX E

Order of Appellate Division, Second Department, Referring Application to Character Committee

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department on the 25th day of May, 1964.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice,*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of
LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

A proceeding having been instituted upon the petition of Leon Fischbein, verified the 7th day of May, 1964, for an order reinstating the said Leon Fischbein, as a member of the Bar (admitted March 11th, 1931—disbarred by order of January 3, 1950), and for such other and further relief as to the court may seem just and proper, and the said pro-

ceeding having come on to be heard by a notice of motion, dated May 7, 1964.

Now on reading and filing said petition, notice of motion, the affidavits of A. Lawrence Acquavella, Louis B. Heller, Anthony J. Di Giovanna, Walter R. Hart, Murray H. Pearlman, Dominic S. Rinaldi, Hyman Barshay, John R. Starkey, Nathan R. Sobel, Monroe Birnberg, Abraham J. Gross, Sol Goldstein, Julius Tanenbaum, Carl E. Haas, David M. Markowitz, Frank P. Plunket, Paul O'Dwyer, Irving Warsoff, Arthur Rosencrans, Leonard Lack, David K. Tuttle, Henry Sugarman, and all the papers filed herein; and the said application having been submitted by Mr. James F. Ryan, attorney for petitioner, and no one appearing for respondent Brooklyn Bar Association, and due deliberation having been had thereon:

It is Ordered that the said application for reinstatement as a member of the Bar is hereby referred to the Committee on Character and Fitness for the Second Judicial District: (a) for investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law; and (b) for a report setting forth the Committee's findings and recommendations.

Enter:

JOHN J. CALLAHAN
Clerk

APPENDIX F

Statutes Involved

NEW YORK STATE CONSTITUTION

ARTICLE I—BILL OF RIGHTS

Section 1. (Rights, privileges and franchise secured)

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

Section 5. (Bail; fines, punishments, detention of witnesses)

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Section 6. (Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process).

. . . No person shall be deprived of life, liberty, or property without due process of law. . . .

Section 11. (Equal protection of laws; discrimination in civil rights prohibited). No person shall be denied the equal protection of the laws of this state or any subdivision thereof. . . .

CIVIL PRACTICE LAWS AND RULES

SECTION 5601—Appeals to the court of appeals as of right

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the

construction of the constitution of the state or of the United States.

JUDICIARY LAW—Section 90

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the Supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

JUDICIARY LAW—Section 90—Admission to and removal from practice by appellate division

Subdivision 10—

Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by

written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records. Formerly Section 88 amended. . . .